

From: Ezra Gale
Sent: Thursday, November 06, 2014 9:26 AM
To: CEQA Guidelines
Subject: Re: Comments on the Office of Planning and Research SB 743 Draft Guidelines



November 6, 2014

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Re: Comments on the Office of Planning and Research SB 743 Draft Guidelines

Dear Mr. Calfee,

Thank you for meeting with the Los Angeles business community regarding the formulation and adoption of the CEQA Guidelines ("Guidelines") with respect to the implementation of SB 743. We greatly appreciate the time and consideration you have taken in engaging in an ongoing dialogue regarding these regulatory changes, which will have a huge impact on the viability of infill development.

As outlined in our previous comment letter, we are very concerned that the proposed new Guidelines will increase litigation risk, particularly for infill development projects. Infill development is crucial to the Los Angeles economy, and California has struggled to keep up with housing demand due to CEQA abuse. Although significant reform will require new legislation, we do believe that there is statutory authority to go further, as described herein.

Background

We appreciate efforts aimed at developing new criteria to analyze transportation impacts. In particular, rejection of the automobile delay metric embodied in level of service or similar measures as a basis for finding a significant transportation impact is an important step to revolutionize CEQA analysis as it relates to transportation impacts for urban, infill developments within transit priority areas ("TPAs"). PRC Sec. 21099 appears to endorse our strong belief that locating projects within urban in-fill locations, including many areas of Los Angeles, where jobs, housing and recreational activities are in close proximity, cannot create a significant transportation impact; greenhouse gas emissions will be less due to the proximity of other uses and the reduced need to drive, and since there are multiple ways of being transported to and within infill areas and transportation corridors, such as by walking, taking a train, bus or other public transportation, biking, skateboarding, driving, or ride-sharing, etc.

However, we also note that there is now some uncertainty with respect to the definition of a transportation impact and how to measure it created by the abolition of time delay as the sole criteria for analyzing the significance of transportation impacts. Consequently, our concern is that, as drafted, the proposed Guidelines do not do enough to bolster the clear statutory direction to encourage infill development where there is a diversity of uses and a diversity of transportation modes available.

Statutory Authority

PRC Sec. 21099 specifically directs the Office of Planning & Research (“OPR”) to set the applicable criteria for determining significant and unavoidable impacts in TPAs. This section requires that OPR establish the criteria on which a local agency decides to establish the transportation threshold of significance and it is similar to the authority that OPR has already exercised in CEQA Guidelines Sec. 15064.5 for determining the significance of historic resources.

Unlike *Communities for a Better Environment v. California Resources Agency*, (“CBE”) (2002) 126 Cal.Rptr.2d 441, where the court found that the proposed guidelines of the California Resource Agency (“CRA”) had established a “... regulatory standard in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect,” with PRC Sec. 21099(b)(1) the State has mandated that OPR establish the criteria for determining the significance of transportation impacts. Thus, while lead agencies, such as the City of Los Angeles, still ultimately may decide when to call a transportation impact significant, unlike most other CEQA impact areas,^{[11](#)} the State has directed OPR to establish the criteria for determining the significance of transportation impacts. In this context, under *CBE*, “a ‘threshold of significance’ for a given environmental effect is simply that level at which the lead agency finds the effects of the Project to be significant, the term may be defined as a quantitative or qualitative standard, or set of criteria, pursuant to which the significance of a given environmental effect may be determined.” Thus, it is difficult to see much of any meaningful distinction between the threshold of significance and the criteria on which it is based.

Under this framework, synthesizing *CBE* with PRC Sec. 21099, the State of California has authorized OPR to establish the set of criteria, i.e., quantitative or qualitative standards, pursuant to which the significance of transportation impacts may be determined.

Unlike *CBE* where the application of a regulatory standard foreclosed the consideration of any other substantial evidence showing there may be a significant effect, here, under SB 743, PRC Sec. 21099(b)(2) specifically mandates that no matter how much substantial evidence of automobile delay exists, as described solely by level of service (“LOS”) or similar measures of vehicular capacity or traffic congestion, this potential evidence of automobile delay is prohibited from being considered a significant and unavoidable impact on the environment. As a result, PRC Sec. 21099 makes several dramatic and important changes in CEQA jurisprudence as it relates to transportation impacts: no matter how much substantial evidence is provided, automobile delay as solely described by LOS or similar measures of vehicle capacity or traffic congestion shall not be considered a significant and unavoidable impact on the environment. Consequently, while a lead agency may have a remnant level of service standard in various planning documents, such as a General Plan, the proposed Guidelines must affirmatively remove automobile delay from all CEQA analysis as solely described by LOS or similar measures of vehicle capacity or traffic congestion, whether in the Transportation or Land Use inconsistency sections. We ask you to incorporate this proposed modification into proposed new CEQA Guideline Sec. 15064.3. For example, if LOS standards are used in a General Plan, then there should not be a CEQA land use inconsistency due solely to a deviation from a General Plan’s LOS standard. Further, to the extent LOS is embedded in a Congestion Management Plan (“CMP”), a deviation from a CMP’s LOS standard should not be a CEQA land use inconsistency.

Recommendations

In this bold new CEQA world for transportation impacts, OPR’s proposed Guidelines take a much needed step forward, but they can improve substantially because they do not fully and clearly establish the criteria for determining the significance of transportation impacts in TPAs.

The proposed Guidelines may be further improved in the following ways:

- **Do not conflate transportation impacts with other CEQA impact areas.**

Proposed Sec. 15064.3(a) raises indirect impact areas, such as air quality, noise and hazards/safety. Referencing these other impact areas here creates some confusion about their relationship to transportation impacts and whether some additional analysis is being required. These topics are already required to be analyzed in other sections of an environmental document pursuant to CEQA Guidelines Appendix G, so it seems a duplicative analysis is unnecessary and inefficient.

- **Bolster the exemption from vehicle miles traveled (“VMT”) analysis for in-fill development within TPAs.**

As stated earlier, in-fill development, including many areas of Los Angeles, promotes the three listed mandatory priorities of PRC Sec. 21099. Therefore, proposed Sec. 15064.3(b)(1) should clearly exempt in-fill development within TPAs from a VMT analysis. The words “... generally may be considered to have a less than significant transportation impact” should be changed to “... generally would be considered to have a less than significant transportation impact.” The subsequent words “generally may” should be changed to “generally would” in this subsection.

- **Proposed Sec. 15064(b)(2) should be redrafted or deleted.**

As drafted, the language is ambiguous since it does not clearly define a “transportation project.” It is possible that *all* projects could be construed as “transportation projects.” Therefore, we ask for more specific language so that the section can be applied narrowly. However, even if the language were to apply only to traffic-inducing transportation projects, there should not be this extra opportunity to sneak in a capacity or automobile delay significant impact through this new induced traffic metric, as it is not in the spirit of PRC Sec. 21099. Since congestion (capacity or automobile delay) will no longer be considered a significant impact, the presence of more cars or capacity should be irrelevant whether induced or directly caused.

- **Many of the proposed mitigation measures listed in Appendix F address social and economic factors that are outside the scope of CEQA.**

Further, they are completely unworkable for individual projects. For example, if a project is residential in nature, it is beyond the scope of a project to increase “access to common goods and services, such as groceries, schools, and daycare.” There is also no factual basis or nexus between “incorporating affordable housing into the project” with transportation impacts. Considering income and net asset thresholds for affordable housing, it is highly likely that to the extent affordable housing residents have cars, affordable housing residents would have older, more heavily polluting cars compared to market rate residents. Moderate income affordable housing residents, such as those at 60 percent AMI are as likely to drive to their jobs as non-affordable housing residents, except due to income/asset requirements the affordable residents at 60 percent AMI are likely to drive older, more heavily polluting cars. It is absolutely unclear how this “mitigation measure” would promote the reduction of greenhouse gasses or the development of multimodal transportation networks. Numerous other proposed “mitigation measures” suffer from similar infirmities - lacking nexus between the asserted purposes and the impacts.

- **Potential social and economic policy goals could be addressed more efficiently outside these proposed Guidelines.**

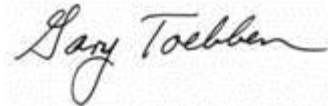
For example, statutory exemptions from CEQA should be enacted for projects providing affordable housing and/or other public benefits within TPAs. The Los Angeles business community strongly believes providing a carrot to incentivize important social and economic policy goals would be preferable to OPR’s proposal of unfeasible mitigation that fails to satisfy constitutional requirements of nexus and rough proportionality. We would be pleased to work with OPR on these needed legislative solutions.

The Los Angeles business community appreciates the opportunity to comment on the proposed Guidelines, and look forward to reviewing revised guidelines that would enhance the statutory priorities of PRC Sec. 21099 more clearly and directly.

Regards,



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^[1] The State has imposed significance criteria for historic and archaeological resources in CEQA.